NO. 82-1330

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

MORRIS L. THIGPEN, COMMISSIONER,
MISSISSIPPI DEPARTMENT OF
CORRECTIONS, ET AL

Petitioners

vs.

BARRY JOE ROBERTS,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE SUPPORTING ORAL ARGUMENT TO BE PRESENTED ON INVITATION FROM THE COURT IN SUPPORT OF THE JUDGMENT BELOW IN SUPPORT OF AFFIRMANCE

RHESA H. BARKSDALE
Post Office Box 22567
Jackson, Mississippi 39205
(601) 948-5711
AMICUS CURIAE

OF COUNSEL:

Luther T. Munford
Butler,Snow,O'Mara,Stevens & Cannada
Post Office Box 22567
17th Floor, Deposit Guaranty Plaza
Jackson, Mississippi 39205
(601) 948-5711

QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals applied the correct standard of review in holding that Respondent, Barry Joe Roberts, has a substantial double jeopardy claim under Illinois v. Vitale, 447 U.S. 410, 65 L.Ed.2d 228, 100 S.Ct. 2260 (1980).

TABLE OF CONTENTS

TABLE OF CONTENTS (CON'T)

TABLE OF CONTENTS (CON'T)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (CON'T)

TABLE OF AUTHORITIES (CON'T)

TABLE OF AUTHORITIES (CON'T)

TABLE OF AUTHORITIES (CON'T)

TABLE OF AUTHORITIES (CON'T)

TABLE OF AUTHORITIES (CON'T)

TABLE OF AUTHORITIES (CON'T)

OTHER AUTHORITIES

This Brief supports oral argument that will be presented pursuant to this Court's Order of December 5, 1983, which provides in part:

> It appearing that respondent is not represented by a member of the Bar of this Court, it is ordered that Rhesa H. Barksdale, Esquire, of Jackson, Mississippi, is invited to present oral argument as amicus curiae in support of the judgment below.

STATEMENT OF THE CASE

Petitioner's statement of the case appears accurate, except in minor detail not material here. As Petitioners indicate, their summary of the facts is for the most part quoted from the Opinion of the Mississippi Supreme Court affirming Roberts' manslaughter conviction (Pets. Brief 2; see J.A. 14-16).

As discussed infra at 57-58, it appears that the County Attorney who pressed the Justice Court misdemeanor

charges also assisted in prosecuting the felony charge in Circuit Court.

SUMMARY OF ARGUMENT

The Fifth Circuit correctly applied the standard set forth in Illinois v. Vitale, 447 U.S. 410, 65 L.Ed.2d 228, 100 S.Ct.2260 (1980), for the evaluation of double jeopardy claims after a second trial. Vitale draws a distinction between statutory analysis of double jeopardy claims on interlocutory appeal, and factual analysis of such claims after the conclusion of a second trial. Vitale expressly authorizes a look beyond the statutes to the factual ingredients of the State's legal theory at the second trial. The Court said Vitale would have a substantial double jeopardy claim if:

> to sustain its manslaughter case the State [finds] it necessary to prove a failure to slow or to rely on conduct necessarily

involving such failure. 447 U.S., at 420.

The Fifth Circuit found here that the trial court's instructions to the jury

> leave no room for doubt that Mississippi did indeed rely on and prove reckless driving as the culpable act of negligence necessary to prove manslaughter. (Cert. Petn. A12-A13).

Petitioners claim Roberts was not placed in double jeopardy because, in some hypothetical other case, another defendant might be convicted of manslaughter in an offense not involving an automobile. Petitioners claim that statutory language, and nothing more, is the guide to resolving all double jeopardy claims.

While statutory analysis may be suited to interlocutory review when the facts at the second trial have not yet been established, once the State has exposed the factual ingredients of its legal theory in the second prosecution,

those ingredients must be considered. The Double Jeopardy prohibition in a successive prosecution case not only protects against prosecutions not intended by the legislature, it also protects against repeated prosecutions that give the prosecutor a chance to sharpen his case through repeated use of identical elements of proof.

In evaluating double jeopardy claims after a second trial, this Court has frequently looked beyond statutory language to determine the ingredients of the prosecutor's case. The statement in Vitale on which the Fifth Circuit relied accurately reflected prior law.

Courts subsequently citing Vitale have followed that statement and recognized that the evaluation of a double jeopardy claim after a second conviction necessitates consideration of more than

just the statutory language. There is no conflict in the lower courts on this meaning.

Petitioners' suggestion that double jeopardy analysis should always be limited to the arid parsing of statutes based on hypothetically conjured facts would substantially constrict the protection of the Double Jeopardy Clause. Petitioners have shown no basis in either law or policy to support the radical shift in double jeopardy law they propose.

Petitioners cannot now contend that Roberts' requesting a trial de novo precludes application of the Double Jeopardy Clause. Petitioners did not raise this issue in the District Court, the Court of Appeals, or in the Petition for Certiorari.

In any event, the right to trial de novo in the Circuit Court did not, under

the circumstances of this case, defeat the attachment of jeopardy. Roberts had a right to trial de novo on the misdemeanors. He attempted to exercise that right, but the State remanded those charges to the file. The State prosecuted him instead on a new manslaughter charge for which he was convicted and sentenced. The State thus subjected Roberts, like the defendant in Vitale, to two trials on different charges for the same offense. This is not a case like Colten v. Kentucky, 407 U.S. 104, 32 L.Ed.2d 584, 92 S.Ct. 1953 (1972), erroneously relied upon by Petitioners, where the State granted a trial de novo and did not initiate new charges at the second trial.

In the alternative, the judgment should be affirmed on due process grounds under Blackledge v. Perry, 417 U.S. 21, 40 L.Ed.2d 628, 94 S.Ct. 2098 (1974). This

issue was raised below and can be presented here in support of the judgment of the Court of Appeals. Here, as in Blackledge, the defendant who appealed a misdemeanor conviction seeking a trial de novo was then prosecuted for a felony. Blackledge held that this per se denied Due Process because of the danger of prosecutorial vindictiveness. Petitioners seem to suggest that Blackledge is distinguishable because there were two prosecutors in this case. This contention, however, is not supported by the record, which shows the County Attorney also appeared in Circuit Court, as the pertinent State law permitted him to do. In any event, the risk of institutional vindictiveness is the same no matter how many prosecutors were involved.

In the further alternative, the writ should be dismissed as improvidently granted.

ARGUMENT

I. The Fifth Circuit Correctly Applied the Standard Set Forth in Illinois v. Vitale for the Evaluation of Double Jeopardy Claims After a Second Trial.

Petitioners argue erroneously that Vitale constricts the evaluation of every double jeopardy claim to nothing more than an arid parsing of statutes based upon hypothetically conjured facts.

This argument ignores the language and holding of Vitale. It fails to note the critical distinction Vitale draws between statutory analysis of double jeopardy claims on interlocutory appeal, and factual analysis of such claims after the conclusion of a second trial. Vitale expressly authorizes a look beyond the

statutes to the ingredients of the legal theory relied on at a second trial.

Petitioners' argument runs contrary to the precedents of this Court which have repeatedly looked beyond statutes to indictments, bills of particulars, and even evidence in evaluating double jeopardy claims. Petitioners argue for a rule that no state or federal court has ever drawn from Vitale, and a rule that would substantially constrict the historic prohibition against double jeopardy.

A. This Court in Vitale recognized that a different standard should be used for evaluating double jeopardy claims when a case is not on interlocutory appeal, but has been tried on the merits.

In the long history of double jeopardy, presentation of such claims on interlocutory appeal is a relatively new chapter. It was not until 1977, for

example, that this Court held that a federal defendant could present a double jeopardy challenge on interlocutory appeal because the guarantee is a guarantee "against being twice put to trial for the same offense." Abney v. United States, 431 U.S. 651, 661, 52 L.Ed.2d 651, 661, 97 S.Ct. 2034 (1977).

Vitale was an interlocutory appeal. There the Illinois courts held a conviction for failing to reduce speed barred a subsequent prosecution for involuntary manslaughter. This Court, 447 U.S. at 416, first quoted the test found in Blockburger v. United States, 284 U.S. 299, 304, 76 L.Ed. 306, 309, 52 S.Ct. 180 (1932):

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses

> or only one, is whether each provision requires proof of a fact which the other does not.

The Court in Vitale then relied on Iannelli v. United States, 420 U.S. 770, 785 n.17, 43 L.Ed.2d 616, 627, 95 S.Ct. 1284 (1975), which said the Blockburger test identified legislative intent and that it:

> focuses on the proof necessary to prove the statutory elements of each offense, rather than on the actual evidence to be presented at trial. 447 U.S. at 416.

The Vitale Court found that failure to reduce speed could be a lesser offense which required no proof beyond that necessary to prove the greater offense, involuntary manslaughter. The Court pointed out, however, that the State claimed it could prove involuntary manslaughter by means other than reliance upon the failure to reduce speed charge.

See 447 U.S., at 418-419 & n. 7. The Court held the State should have the opportunity to do so. It said:

> The mere possibility that the State will seek to rely on all of the ingredients necessarily included in the traffic offense to establish an element of its manslaughter case would not be sufficient to bar the latter prosecution. 447 U.S., at 419.

The Court thus remanded the case to the Illinois courts for prosecution. The Court went on to state, however, that a different method of review would apply following an actual trial:

> In any event, it may be that to sustain its manslaughter case the State may find it necessary to prove a failure to slow or to rely on conduct necessarily involving such failure; it may concede as much prior to trial. In that case, because Vitale has already been convicted for conduct that is a necessary element of the more serious crime for which he has been charged, his claim of double jeopardy would be substantial under Brown and our later decision in Harris v. Oklahoma,

433 US 682, 53 L Ed 2d 1053, 97 S Ct 2912 (1977).

In Harris, we held, without dissent, that a defendant's conviction for felony murder based on a killing in the course of an armed robbery barred a subsequent prosecution against the same defendant for the robbery. The Oklahoma felony-murder statute on its face did not require proof of a robbery to establish felony murder; other felonies could underlie a felony-murder prosecution. But for the purposes of the Double Jeopardy Clause, we did not consider the crime generally described as felony murder as a separate offense distinct from its various elements. Rather, we treated a killing in the course of a robbery as itself a separate statutory offense, and the robbery as a species of lesser-included offense. The State conceded that the robbery for which petitioner had been indicted was in fact the underlying felony, all elements of which had been proved in the murder prosecution. We held the subsequent robbery prosecution barred under the Double Jeopardy Clause, since under In Re Nielsen, 131 US 176, 33 L Ed 118, 9 S Ct 672 (1889), a person who has been convicted of a crime having several elements

> included in it may not subsequently be tried for a lesser-included offense--an offense consisting solely of one or more of the elements of the crime for which he has already been convicted. Under Brown, the reverse is also true; a conviction on a lesser-included offense bars subsequent trial on the greater offense.
>
> By analogy, if in the pending manslaughter prosecution Illinois relies on and proves a failure to slow to avoid an accident as the reckless act necessary to prove manslaughter, Vitale would have a substantial claim of double jeopardy under the Fifth and Fourteenth Amendments of the United States Constitution. 447 U.S., at 420-421. (Emphasis added).

The Court thus drew a distinction between interlocutory appeals and appeals after a second trial. In interlocutory appeals where the State claims it can prove two offenses using different facts, double jeopardy does not bar prosecution *per se*. If, however, the State concedes it will use all the elements of one

offense to prove the violation of another, or if its proof at trial reflects such a legal theory, then the prosecution has placed the defendant in double jeopardy.

Vitale's comment concerning events at a second trial was dictum. The Court therefore properly phrased its statement in terms of the defendant having only a "substantial claim" of double jeopardy rather than prejudging the case. As discussed infra at 28-36, however, the lower courts have interpreted Vitale as expressing a standard for judging double jeopardy claims after a second trial. That interpretation is consistent with the prior holdings of this Court and other courts.

Petitioners state in the question presented that they wish the Court to decide whether or not this "substantial claim" test is in fact a valid double

jeopardy test. Petitioners' Brief, however, wholly fails to quote or even cite the controlling language from Vitale concerning appeals after a second trial.

B. The Fifth Circuit correctly applied the Vitale standard for double jeopardy challenges after a second trial.

In this case, the Fifth Circuit used the label "second prong" to refer to Vitale's statements concerning double jeopardy review after a second trial. It applied that "prong" and found that respondent had been tried twice for the same offense. It said:

> Roberts unquestionably has such a "substantial claim" of double jeopardy under the second prong that his trial and conviction for manslaughter are precluded.
>
> The focus here is on the evidence actually presented at trial. If the state had to prove reckless driving or had to rely on conduct necessarily involving reckless driving in order to prove manslaughter,

> Roberts has a substantial claim of double jeopardy under the fifth and fourteenth amendments of the United States Constitution. The same evidence that led to Robert's conviction on the misdemeanor charge was also introduced in the manslaughter trial. The trial court's instructions to the jury leave no room for doubt that Mississippi did indeed rely on and prove reckless driving as the culpable act of negligence necessary to prove manslaughter. (Footnotes omitted) (Cert. Petn. A11-A13).

The Fifth Circuit thus found present the precise elements the Vitale Court said would give rise to double jeopardy.

Petitioners concede here that the same evidence was relied upon in both the misdemeanor and felony trials. (Pets. Brief 19). Indeed the court's charge to the jury makes it explicit that the misdemeanors were the only culpable acts relied upon by the State to establish manslaughter by culpable negligence. Petitioners have not urged any other

evidence upon which a finding of the culpable negligence necessary to prove manslaughter could have been based.

Petitioners thus cannot even make the claim offered by Illinois in Vitale. They cannot claim that they will prosecute this defendant on separate ingredients of proof. The trial has already taken place and the ingredients were the same. Petitioners' argument is that, in some other case, the culpable negligence element could be proven, without showing reckless driving or other misdemeanor offenses upon which Roberts' manslaughter conviction was based. Such speculation, however, is now hypothetical conjuring. The Fifth Circuit correctly applied Vitale

and affirmed the grant of the writ of habeas corpus.[1]

C. In evaluating double jeopardy claims after a second trial, this Court has repeatedly looked beyond statutory language to determine the ingredients of the prosecution's case.

Petitioners' claim, that this Court should restrict its review to an arid

---

[1]The Fifth Circuit also suggested that the "judicial veneer" given the manslaughter statute by Mississippi courts, e.g. Smith v. State, 197 Miss. 802, 20 So.2d 701, 704 (1945), made it a manslaughter by automobile statute which was necessarily inclusive of the misdemeanor automobile offenses under Blockburger. The Court was correct in looking to this veneer. See Vitale, 447 U.S., at 416-417. Where the Court, however, has available to it the "evidentiary veneer" applied by the State in an actual prosecution, it need not rely on the prior "statutory veneer" applied by judges.

parsing of statutes on hypothetically conjured facts, is directly contrary to a long line of precedents in this Court. Vitale's comment concerning the use of evidence at a second trial stated the law. It did not change the law.[2]

---

[2]See C. Antieau, Modern Constitutional Law §§5:25, 5:28 (1969); 21 Am.Jur.2d Criminal Law §276; ABA, Standards for Criminal Justice 13-2.3(c) (1980).

An examination of the state court cases on which petitioners rely--all of which pre-date Vitale--also illustrates this point. In State v. Stewart, 223 N.W.2d 250 (Iowa 1974), the Court looked to the evidence and held a prosecution for reckless driving did not bar a prosecution for manslaughter when the former could be shown by speeding and running a stop sign and the later by intoxication. In State v. James, 606 P.2d 1101 (N.M. Ct. App. 1979), rev'd on other grounds, 603 P.2d 715 (N.M. 1979), the Court looked to the information and held that prior prosecutions for reckless driving and driving under the influence barred a prosecution for homicide, distinguishing State v. Tanton, 540 P.2d 813 (N.M. Sup. Ct. 1975) in which there was no prior

(Cont'd.)

In the venerable case of In Re Nielsen, 131 U.S. 176, 33 L.Ed. 118, 9 S.Ct. 672 (1889), the Court held that a trial for adultery after one for unlawful cohabitation constituted double jeopardy. The Court quoted the language of the two indictments and noted that the petitioner:

> averred that the two indictments were found against him upon the testimony of the same witnesses, on one oath and one examination as to the alleged offense, covering the entire time specified in both indictments. 131 U.S., at 186.

(Cont'd.)
prosecution for reckless driving so that separate evidence was available to support the homicide charge. See also infra at 28-36. Tanton expressly approved this test:

> "whether the facts offered in support of one [offense] would sustain a conviction of the other." 540 P.2d at 815, quoting Owens v. Abram, 58 N.M. 682, 274 P.2d 630 (1954). (Emphasis added).

James was reversed on a finding that jeopardy had not attached on the misdemeanor. 603 P.2d at 716.

The Court went on to quote the source of the Blockburger test, Morey v. Commonwealth, 108 Mass. 433, 435 (1871). It said:

> "A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. The test is not, whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." We think, however, that that case is distinguishable from the present. The crime of loose and lascivious association and cohabitation did not necessarily imply sexual intercourse, like that of living together as man and wife, though strongly presumptive of it. But be that as it may, it seems to us very clear that where, as in this

> case, a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense. (Emphasis added). 131 U.S., at 188.

In Grafton v. United States, 206 U.S. 333, 51 L.Ed. 1084, 27 S.Ct. 749 (1907), the Court held that an acquittal for murder precluded a subsequent prosecution for killing without premeditation. The Court quoted the indictments and referred to the evidence. It said:

> But if not guilty of homicide, as defined in the latter section of the Penal Code,--and such was the finding of the court-martial,--he could not, for the same acts and under the same evidence, be guilty of assassination, as defined in the former section of the Code. 206 U.S., at 349. (Emphasis added).

In Waller v. Florida, 397 U.S. 387, 25 L.Ed.2d 435, 90 S.Ct. 1184 (1970), the Court held that convictions for

obstruction of city property and disorderly breach of the peace barred a subsequent prosecution for grand larceny. The Court noted:

> It is conceded that this information [charging grand larceny] was based on the same acts of the petitioner as were involved in the violation of the two city ordinances. 397 U.S., at 388. (Emphasis added).

The Court repeatedly emphasized the importance of this concession in its opinion. See 397 U.S., at 389-390. It also reserved the possibility that the defendant could later be prosecuted for "offenses not embraced within the charges against him in the municipal court." 397 U.S., at 395 n.6.

In Harris v. Oklahoma, 433 U.S. 682, 53 L.Ed.2d 1054, 97 S.Ct. 2912 (1977), the Court reversed a conviction for robbery with firearms when the defendant had previously been convicted of felony

murder. The Court noted the State's concession that:

> "[I]n the Murder case, it was necessary for all the ingredients of the underlying felony of Robbery with Firearms to be proved. . . . 433 U.S., at 682 n.*.

It then held, quoting language from In Re Nielsen, that:

> When as here, conviction of a greater crime, murder, cannot be had without conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime after conviction of the greater one. 433 U.S., at 682.

Finally, in Brown v. Ohio, 432 U.S. 161, 53 L.Ed.2d 187, 97 S.Ct. 2221 (1977), the Court held that a defendant who had pleaded guilty to a misdemeanor charge of joy riding could not be subsequently prosecuted for auto theft. The Court carefully noted the facts charged in the misdemeanor complaint and the felony

indictment and held that the second prosecution was barred. 432 U.S., at 162-163. The Court stated in a footnote:

> Because we conclude today that a lesser included and a greater offense are the same under Blockburger, we need not decide whether the repetition of proof required by the successive prosecutions against Brown would otherwise entitle him to the additional protection offered by Ashe [v. Swenson, 397 U.S. 436, 25 L.Ed.2d 469, 90 S.Ct. 1189 (1970)] and Nielsen. 432 U.S., at 166 n.6.

In sum, this Court has repeatedly looked beyond statutory phrasing to the facts alleged in indictments or proved at trial in evaluating claims of double jeopardy. The claim is established if the necessary ingredients, or factual elements, of proof of one prosecution include all the necessary factual elements proved in the other prosecution.

One purpose of the Double Jeopardy Clause is to prevent the prosecutor from

developing his case through successive prosecutions at the defendant's expense. United States v. DiFrancesco, 449 U.S. 117, 129, 66 L.Ed.2d 328, 101 S.Ct. 426 (1980); Burks v. United States, 437 U.S.1, 11, 57 L.Ed.2d 1, 9, 98 S.Ct. 2141 (1978). By looking beyond the statutes to the ingredients of proof, the Court's double jeopardy cases prevent the prosecutor from repeated use of identical elements of proof. This is a purpose wholly distinct from determining legislative intent, which this Court has said is the function of the Blockburger test on which Petitioners rely. See Iannelli v. United States, 420 U.S. 770, 785 n.17, 43 L.Ed.2d 616, 627, 95 S.Ct. 1284 (1975).

D. The Courts citing Vitale have recognized that the evaluation of a double jeopardy claim after a second conviction necessitates consideration of more than just statutory language.

Every federal court of appeals citing Vitale on this point has recognized that the evaluation of a double jeopardy claim after a second conviction necessitates consideration of more than just the statutory language. United States v. Middleton, 673 F.2d 31 (1st Cir. 1982) (evidence); Government of Virgin Islands v. Brown, 685 F.2d 834, 838-839 (3rd Cir. 1982) (jury instructions); Stephens v. Zant, 631 F.2d 397, 401 (5th Cir. 1980), reversed on other grounds _____ U.S. _____, 77 L.Ed.2d 235, 103 S.Ct. _____ (1983) (the record); United States v. Phillips, 664 F.2d 971, 1006 n.48 (5th Cir. 1981) (factual issues

resolved); United States v. Bendis, 681 F.2d 561, 563-565 (9th Cir. 1982) (factor analysis) (criticizing United States v. Brooklier, 637 F.2d 620, 624 (9th Cir. 1981); United States v. Puckett, 692 F.2d 663, 667-668 (10th Cir. 1982) (indictment and transcript).

The Sixth Circuit, after careful review of Vitale and Whalen v. United States, 445 U.S. 684, 63 L.Ed.2d 715, 100 S.Ct. 1432 (1980) concluded:

> What the reviewing court must do now in applying Blockburger is go further and look to the legal theory of the case or the elements of the specific criminal cause of action for which the defendant was convicted without examining the facts in detail. Pandelli v. United States, 635 F.2d 533, 538 (6th Cir. 1980). (Emphasis added).

The Sixth Circuit has applied Pandelli both to reject and to uphold

double jeopardy challenges. See, United States v. Sutton, 700 F.2d 1078, 1081 (6th Cir. 1983); Pryor v. Rose, 724 F.2d 525 (6th Cir. No. 81-4501, January 6, 1984) (en banc).

Only two federal decisions appear to have specifically discussed the "substantial claim" language in Vitale. In one such case, United States v. Haggerty, 528 F.Supp. 1286 (D. Colo. 1981), the Court held that double jeopardy prohibited the prosecution of the defendants for participating in strike against the government after they had already been convicted of contempt. The Court quoted the "substantial claim" language of Vitale and stated:

> In the instant case, there is no uncertainty as to proof; the government has already relied on and proven the elements of the lesser offense--§1918(3), striking against the government--in order

> to establish the technically greater offense of criminal contempt of a court order prohibiting strike activities. [18 U.S.C. §401(3)]. Accordingly, this latter prosecution under §1918(3) is barred by the double jeopardy clause. 528 F.Supp, at 1298.

In its analysis the Court referred to the government's complaint, its memorandum in support of the temporary restraining order, and the evidence at the contempt hearing. 528 F.Supp., at 1297. See also United States v. Abess, 532 F.Supp. 490, 492 (E.D. Mich. 1982).

Similarly, state courts discussing the "substantial claim" language in Vitale have recognized that the evaluation of double jeopardy claim after a second conviction requires consideration of more than just the statutory language.

In Carter v. State, 424 N.E.2d 1047 (Ind. Ct. App., 3d Dist. 1981), the Court upheld a double jeopardy challenge to

convictions for both reckless homicide and causing death by operating a motor vehicle while intoxicated. In a concurring opinion, Judge Staton sailed into the "Sargasso Sea" of double jeopardy. See Albernaz v. United States, 450 U.S. 333, 343, 67 L.Ed.2d 275, 284, 101 S.Ct. 1137, 1144-45 (1981). He said:

> Sometimes, the statutes may appear distinct on their faces, but, when analyzed in conjunction with a particular legal theory, the statutes proscribe the "same offense." Vitale, supra, 447 U.S. at 420-21, 100 S.Ct. at 2267, 65 L.Ed.2d at 238.
>
> * * *
>
> When the legal theory the State asserts in support of the reckless homicide charge necessitates the proof of the defendant's intoxication, the offense of causing death while driving and being intoxicated becomes a lesser included offense of the greater offense, reckless homicide. As such, punishment for both is prohibited under the Double

Jeopardy Clause. 424 N.E.2d, at 1051.

Judge Staton rested this conclusion not only on Whalen and Vitale, but also on the Sixth Circuit's decision in Pandelli, supra.

Other state courts quoting the "substantial claim" language of Vitale have also recognized that the evaluation of a double jeopardy claim after a second conviction requires consideration of more than just statutory language. This is true not only in traffic cases, but also in bad check, contempt, and firearms cases.[3]

---

[3]See State v. Dively, 92 N.J. 573, 458 A.2d 502 (1983) ("elements. . . relied upon); State v. Griffin, 277 S.E.2d 77 (N.C. Ct. App. 1981) (stipulation as to state's proof); Day v. State, 163 Ga. App. 839, 296 S.E.2d 145, 147 (Ga. Ct. App. 1982) ("only way the state could prove"); (Cont'd.)

Going beyond the statutory analysis and looking at the legal theory upon which the State relies in a particular case as shown by the indictment, jury charge, and if necessary, evidence, has not resulted in license to commit mayhem on the highways, as is suggested by the National District Attorneys Association, Inc. in its amicus curiae Brief.

For example, the New Jersey Supreme Court has issued a directive to all municipal court judges to withhold actions on drunk driving accidents involving personal injuries until clearance to proceed has been obtained from the county prosecutor. State v. Dively, 92 N.J. 573,

---

(Cont'd.)
Yarbro v. State, 402 So.2d 599, 601 (Fla. Ct. App., 2d Dist. 1981) ("facts. . . identical"); Baker v. State, 425 So.2d 36 (Fla. Ct. App., 5th Dist. 1983) ("essential building blocks of proof").

458 A.2d 502, 511 (N.J. 1983). Such personal injury--particularly death--warns that a prosecutor may wish to bring charges for a greater offense and that care should be taken to avoid double jeopardy claims. This simple precaution places a miniscule burden on the State and yet prevents multiple prosecutions. In Mississippi, a statute has required since 1980 reports by the County Attorney to the District Attorney concerning certain offenses. See Miss. Code Ann. §19-23-11(5) (Supp. 1983; App. B).

Also, a prosecutor can frequently rely on different elements of proof to support the greater charge. In People v. Reed, 92 Ill. App. 3d 1115, 48 Ill. Dec. 421, 416 N.E.2d 694, 698 (1981), the Court upheld a conviction for driving under the influence which followed a conviction for running a red light. It said:

> [Here] we believe the conviction for driving under the influence is sustained by the breathalyzer results and admissions of defendant, rendering evidence of running the red light superfluous. Therefore, the present defendant does not have even a "substantial" double jeopardy claim. 416 N.E.2d at 700.

See also Commonwealth v. Spurgeon, 428 A.2d 189, 191 (Pa. Super. Ct. 1981).

The prosecutor amici offer no proof that these techniques are insufficient to protect the public interest in prosecuting drunk drivers.

E. Limiting double jeopardy to statutory analysis of hypothetical facts would substantially constrict the historic protection against double jeopardy.

Petitioners' attempt to totally divorce statutes from facts easily leads to non-sensical results.

In Harris v. Oklahoma, 433 U.S. 682, 53 L.Ed.2d 1054, 97 S.Ct. 2912 (1977), the

Court reversed on double jeopardy grounds a conviction for robbery with firearms because the defendant had previously been convicted of felony murder. The Court noted the State's concession that "all the ingredients" of robbery with firearms were necessary for the State to prove its murder case. 433 U.S., at 682 n.*.

In Whalen v. United States, 445 U.S. 684, 63 L.Ed.2d 715, 100 S.Ct. 1432 (1980), the Court noted that six different felonies could provide a basis for felony murder in the District of Columbia, but that:

> In the present case, however, proof of rape is a necessary element of proof of the felony murder. . . . 445 U.S., at 694.

Under Petitioners' theory in this case, the result in Harris and Whalen were erroneous because some other underlying

felony could hypothetically have been used to prove felony murder.

Similarly, it could have been argued in Brown v. Ohio, 432 U.S. 161, 53 L.Ed.2d 187, 97 S.Ct. 2221 (1977) that because the defendant could hypothetically have gone joy riding in one car and then stolen another car, the offenses were not the same for double jeopardy purposes.

In short, the rule for which Petitioner argues would permit conjured facts to defeat an otherwise valid double jeopardy claim. This was not the purpose of Vitale. The thrust of the Vitale decision is to give the State a chance to prove independent facts at trial. Nothing in Vitale or any other decision can be read to say that the State can ignore that opportunity with impunity.

This case is a rare case. For whatever reasons, the State of Mississippi

prosecuted respondent for four misdemeanors and then used each of those same misdemeanors, and nothing else, to prove culpability in a prosecution for manslaughter by automobile. If the State had charged respondent in a single proceeding and prosecuted him there for three of the misdemeanors and instructed the jury that it was relying on other evidence to establish culpable negligence, then no double jeopardy claim would be presented.

For these reasons, the Court should affirm the Fifth Circuit's decision that Roberts' trial placed him twice in jeopardy.

II. Petitioners Cannot Contend That Roberts' Requesting a Trial De Novo Precludes Application of the Double Jeopardy Clause, Because They Did Not Raise This Issue Below or in the Petition for Writ of Certiorari.

Following trial and conviction in Justice Court on misdemeanor charges, including reckless driving, Roberts appealed, seeking a mandatory trial de novo in Circuit Court. Miss. Code Ann. §99-35-1 (1972). Prior to such trial, Roberts was indicted for manslaughter for the same conduct; and the Circuit Court consolidated trial of the misdemeanor and felony charges. At trial the State was granted leave to sever the four misdemeanor charges from the felony charge and remanded them to the file.[4] Following

[4]Petitioners state this occurred "prior to the close of the State's case"; (Cont'd.)

the Court instructing the jury only on the manslaughter charge, Roberts was convicted (J.A. 95-99).

The single question presented by the Petition for Writ of Certiorari was:

> Whether the Court of Appeals applied the correct standard of review in holding that Respondent, Barry Joe Roberts, has a substantial double jeopardy claim under the United States Supreme Court's holding in Illinois v. Vitale, 447 U.S. 410, 65 L.Ed.2d 228, 100 S.Ct. 2260 (1980).

Furthermore, the single reason presented why certiorari should be granted was

> because the opinion of the United States Court of Appeals for the Fifth Circuit is contra to the law of double jeopardy as decided in Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L.Ed. 306 (1932). (Cert. Petn. 4).

(Cont'd.)
but the Record indicates only that trial was "in progress" (compare Pets. Brief at 5-6 with J.A. 95-96).

This Court's grant of certiorari did not include any additional questions to be considered. _____ U.S. _____, 77 L.Ed.2d 1315, 103 S.Ct. 2427 (May 31, 1983). However, the State now argues a second basis for overturning the decision below: that Roberts' trial de novo renders the Double Jeopardy Clause inapplicable, contending:

> Consequently, the threshold question concerns the effect of a trial de novo as it relates to the Double Jeopardy Clause. The answer seems to lie in Colten [v. Kentucky, 407 U.S. 104 (1972)], supra.
>
> * * *
>
> The effect, therefore, of a right to a trial de novo wipes the slate clean, and a defendant stands in no worse position than he did before initial conviction in the justice court. Consequently, the Double Jeopardy Clause is simply inapplicable. (Pets. Brief 13-14).

This Court's Rule 21.1(a) provides that

> [t]he statement of a question presented will be deemed to comprise every subsidiary question fairly included therein. Only the questions set forth in the petition or fairly included therein will be considered by the Court.

The trial de novo issue is not a "subsidiary question fairly included" within the question presented concerning Vitale. Neither the new trial de novo issue, nor Colten, are mentioned in the Petition for Writ of Certiorari. Furthermore, Petitioners have violated this Court's Rule 34.1(a), which provides that the Petitioners' "Brief may not raise additional questions or change the substance of the questions already presented . . . ."

It does not appear that this new issue was presented, or that Colten was even cited, to either the District Court

or the Court of Appeals.[5] This Court has consistently upheld its Rule that it will not consider questions not presented in the Petition. Neely v. Eby Construction Co., 386 U.S. 317, 321 n.3, 18 L.Ed.2d 75, 80, 87 S.Ct. 1072 (1967); Irvine v. California, 347 U.S. 128, 129-130, 98 L.Ed. 561, 567, 74 S.Ct. 381 (1954); General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175, 177-179, 82 L.Ed. 1273, 1274-1276, 58 S.Ct. 849 (1938). As discussed infra, this is especially true where the issue was not

---

[5]See the Answer and Return to Petition for Writ of Habeas Corpus (J.A. 87-89), the Magistrate's Report and Recommendation (Cert. Petn. A1-A4), the Objection to Magistrate's Report and Recommendation (J.A. 116-132), the Petitioner's Brief on appeal to the Fifth Circuit (submitted to the Clerk of the Court with the filing of this Brief to be lodged with the Record), and the Opinion of that Court (Cert. Petn. A7-A13).

raised below. Dorszynski v. United States, 418 U.S. 424, 431 n.7, 41 L.Ed.2d 855, 862, 94 S.Ct. 3042 (1974); Espinoza v. Farah Manufacturing Co., 414 U.S. 86, 96 n.9, 38 L.Ed.2d 287, 295, 94 S.Ct. 334 (1973).

Aside from whether the issue was presented in the Petition, this Court has stated consistently that it will not decide an issue not raised below unless there are "exceptional circumstances." United States v. Lovasco, 431 U.S. 783, 788 n.7, 52 L.Ed.2d 752, 758, 97 S.Ct. 2044 (1977); Duignan v. United States, 274 U.S. 195, 200, 71 L.Ed. 996, 1000, 47 S.Ct. 566 (1927). See, e.g., NLRB v. Sears Roebuck & Co., 421 U.S. 132, 165, 44 L.Ed.2d 29, 55-56, 95 S.Ct. 1504 (1975); Tacon v. Arizona, 410 U.S. 351, 352, 35 L.Ed.2d 346, 348, 93 S.Ct. 998 (1973); Ramsey v. United Mine Workers, 401 U.S.

302, 311-312, 28 L.Ed.2d 64, 71-72, 91 S.Ct. 658 (1971); Adickes v. Kress & Co., 398 U.S. 144, 147 n.2, 26 L.Ed.2d 142, 148, 90 S.Ct. 1598 (1970); and Tyrrell v. District of Columbia, 243 U.S. 1, 61 L.Ed. 557, 37 S.Ct. 361 (1917). No "exceptional circumstances" exist that should cause this Court to consider this new issue.

III. The Right to Trial De Novo in Circuit Court Did Not Defeat The Attachment of Jeopardy.

The new trial de novo issue should not be considered. But even if it is, it is without merit. Petitioners argue that the Double Jeopardy Clause is inapplicable because the right to trial de novo "wipes the slate clean." (Pets. Brief 14). This argument is based upon the following language from Colten:

> Colten's alternative contention is that the Double Jeopardy Clause prohibits the imposition of an enhanced penalty upon reconviction. . . .

> The contention also ignores that a defendant can bypass the inferior court simply by pleading guilty and erasing immediately thereafter any consequence that would otherwise follow from tendering the plea. 407 U.S., at 119; 32 L.Ed.2d, at 595 (Pets. Brief 13; emphasis by Petitioners).

Petitioners rely upon the above emphasized dictum to jump to the contention that "[l]ikewise, a defendant in Mississippi can bypass the inferior court . . . by pleading guilty and may thereafter erase any consequence thereof by merely appealing to the next higher level court." (Pets. Brief 13).

Petitioners overemphasize the significance of this dictum. Surely the Court was not suggesting that a defendant who maintains his innocence, as Roberts did, should plead guilty in order to avoid the harassment and dangers of double jeopardy in cases similar to this.

In any event, the Colten statement concerning trial de novo simply does not apply here. In this case, respondent's second trial was not a trial de novo on the misdemeanors. Rather, it was at its conclusion nothing more than a second prosecution, this time on enhanced felony charges. Respondent was subjected to enhanced charges, not just an increased sentence.

In Colten, the defendant sought only a trial de novo. The State gave him a trial de novo on the original charges and that was all the State gave him. He was tried and convicted again on the original charges against him. The "slate" at the second trial was "clean" because the charges were identical to those previously vacated.

Here Respondent did not receive a trial de novo on the original charges, and

so his request for such a trial is irrelevant. He sought a trial de novo but the State remanded the misdemeanors to the file. The first proceeding was thus concluded in his favor without completion of a de novo trial. Roberts' request for a trial de novo thus became immaterial to the outcome of the case.

The State, not Roberts, initiated the only charges presented to the jury at the second proceeding. The State indicted and tried Roberts for manslaughter. Roberts did not ask to be tried for manslaughter. Nor can he in any sense be said to have waived his right not to be charged for manslaughter after his conviction for the underlying misdemeanors. Any suggestion that he made such a waiver is a fiction "in the vein of the Mikado." North Carolina v. Pearce, 395 U.S. 711, 721 n.17, 23 L.Ed.2d 656, 667, 89 S.Ct. 2072

(1969) quoting King v. United States, 98 F.2d 291 (D.C. Cir. 1938).

Colten thus has no application here because Roberts' request for a trial de novo was irrelevant to the outcome of his case. The State mooted the request by remanding the charges to the file. The State then concluded the trial on a new charge initiated by the State. This placed respondent in the same position as the defendant in Vitale. He was forced to defend a felony charge after an earlier prosecution for lesser included misdemeanors.

This case thus bears some similarity to Breed v. Jones, 421 U.S. 519, 533, 44 L.Ed.2d 346, 357-358, 95 S.Ct. 1779 (1975) in which the Court held it to be a violation of Double Jeopardy for the State to try a defendant on juvenile charges and then dismiss that proceeding in favor of

trial as an adult. The Court's other cases concerning two-stage criminal proceedings all involve an appellate trial or hearing on the original charges and thus have no relevance here. See Ludwig v. Massachusetts, 427 U.S. 618, 49 L.Ed.2d 732, 96 S.Ct. 2781 (1976); Swisher v. Brady, 438 U.S. 204, 57 L.Ed.2d 705, 98 S.Ct. 2699 (1978); Justices v. Lydon, No. 82-1479.

IV. Alternatively, The Judgment of the Court of Appeals Should be Affirmed Pursuant to Blackledge v. Perry.

The judgment of the Fifth Circuit based upon a double jeopardy violation should be affirmed. Alternatively, the judgment should be affirmed on due process grounds under Blackledge v. Perry, 417 U.S. 21, 40 L.Ed.2d 628, 94 S.Ct. 2098 (1974).

The Magistrate recommended that Roberts' habeas petition be granted on both double jeopardy and due process grounds, relying on Vitale and Blackledge respectively (Cert. Petn. A1-A4). The District Court ruled "that the facts of this case fall squarely within Blackledge. . ." (Cert. Petn. A6).

The Fifth Circuit based its decision solely on double jeopardy grounds under Vitale, and did not reach the Blackledge due process issue. (Cert. Petn. A8 n.2).[6]

---

[6]The Court stated:
The district court found that a violation of due process constituted an alternative basis for habeas corpus relief. In so finding, the court relied on Blackledge v. Perry. . . for the proposition that the state may not substitute a felony charge for a misdemeanor charge which covers the same conduct after the defendant has been convicted of the misdemeanor and has exercised his
(Cont'd.)

A. Respondent may urge the denial of due process as an additional ground in support of the judgment.

Roberts urges the Blackledge due process ground here as one of the bases for upholding the judgment (Resp. in Opp. to Cert. 8 and Brief 9.) Although the Blackledge due process issue is not a question which the writ of certiorari issued to review, the well established rule is that the respondent may "urge in support of a . . . [judgment] any matter appearing in the record although his argument may involve . . . insistence upon matter overlooked or ignored by" the lower

---

(Cont'd.)
right under state law to appeal and to trial de novo. Because we find Roberts' manslaughter conviction barred by the double jeopardy clause, we do not reach the Blackledge ground for the court's holding. (Emphasis added.)

court. United States v. American Railway Express Co., 265 U.S. 425, 435, 68 L.Ed 1087, 1093, 44 S.Ct. 560 (1924). (Emphasis added). See, e.g., Heckler v. Campbell, ____ U.S. _____, _____ n. 12, 76 L.Ed.2d 66, 75-76, 103 S.Ct. 1952 (1983); Hankerson v. North Carolina, 432 U.S. 233, 240 n.6, 53 L.Ed.2d 306, 314, 97 S.Ct. 2339 (1977); Dandridge v. Williams, 397 U.S. 471, 475 n.6, 25 L.Ed.2d 491, 496, 90 S.Ct. 1153 (1970); McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430, 434, 84 L.Ed. 849, 851, 60 S.Ct. 670 (1940); Morley Construction Co. v. Maryland Casualty Co., 300 U.S. 185, 191, 81 L.Ed. 593, 597-598, 57 S.Ct. 325 (1937).

As demonstrated supra, the judgment should be affirmed on double jeopardy grounds. However, if the Court holds otherwise, then it should affirm the

judgment on Blackledge due process grounds.

B. Respondent's second trial on enhanced charges denied him due process under Blackledge v. Perry.

In Blackledge, the defendant, while in prison, fought with another prisoner and was charged with the misdemeanor of assault with a deadly weapon. After conviction, he appealed and sought a trial de novo. He was then indicted for the same conduct and charged with the felony of assault with a deadly weapon with intent to kill and inflict serious bodily injury. This Court noted that the indictment "covered the same conduct for which [defendant] had been tried and convicted" in the inferior court. 417 U.S., at 23. Before this Court, Perry charged violations of both double jeopardy and due process. This Court addressed

only the due process claim. In imposing a per se prohibition against such increased charges after appeal, this Court stated:

> The lesson that emerges from Pearce, Colten and Chaffin is that the Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only by those that pose a realistic likelihood of "vindictiveness." Unlike the circumstances presented by those cases, however, in the situation here the central figure is not the judge or the jury, but the prosecutor. The question is whether the opportunities for vindictiveness in this situation are such as to impel the conclusion that due process of law requires a rule analagous to that of Pearce. We conclude that the answer must be in the affirmative. 417 U.S., at 27.

This Court pointed out in Blackledge that the rule it adopted did not bar trial de novo on the original charges, simply that it barred trial on the new charges brought after appeal was taken. Id, at 31 n.8. The bar imposed by Blackledge is

absolute,[7] and a showing of vindictiveness by the State is not required. Id., at 28. For discussion by this Court of Blackledge, see United States v. Hollywood Motor Car Company, Inc., 458 U.S. 263, 73 L.Ed.2d 754, 102 S.Ct. 3081 (1982); United States v. Goodwin, 457 U.S. 368, 73 L.Ed.2d 74, 102 S.Ct. 2485 (1982).

Petitioners seem to suggest that there could be no vindictiveness because of the supposed separation of duties between the County Prosecuting Attorney

---

[7]The absolute rule adopted in Blackledge would not apply if the State "had shown that it was impossible to proceed on the more serious charge at the outset. . . ." 417 U.S., at 29, n.7. See also United States v. Goodwin, 457 U.S., at 370 n.8; 73 L.Ed.2d, at 78. Of course, no such showing can be made here. As the Petitioners concede, the same evidence presented at the Justice Court trial within seven days after the accident was utilized at the Circuit Court trial (Pets. Brief 19; J.A. 104-111, 90, 94-99).

and the District Attorney (see Pets. Brief 5 n.1). As noted, proof of vindictiveness is not required. Furthermore, this point does not appear to have been raised in either the District Court or Fifth Circuit (see J.A. 114, 116-132; Cert. Petn. A1-A4 and A7-A13; and Pets. Brief in Fifth Circuit). Accordingly, no definite evidence of such separation appears in the Record. In any event, as indicated infra n. 8, such separation here is highly questionable. For example, the County Attorney who apparently prosecuted the misdemeanor charges in Justice Court also represented the State at the manslaughter arraignment and apparently assisted the District Attorney at trial.[8]

---

[8]It is unclear what role the County and District Attorneys played in the (Cont'd.)

Moreover, this Court's Opinion in

(Cont'd.)
Justice Court and Circuit Court trials, as well as in obtaining the manslaughter indictment. See Petitioners' Brief, at 5 n.1 concerning the roles played by Mississippi County and District Attorneys. Although the Petitioners conclude by stating that "[p]ractically speaking, county prosecuting attorneys handle all misdemeanor cases, and district attorneys handle all felony cases," neither the statutes cited by the Petitioners, nor the Record, support that statement.

Both apparently participated in the manslaughter trial. See J.A. 90 (indictment signed by District Attorney); 92 (County, not District, Attorney represented the State at the manslaughter arraignment); and 94 (the District and County Attorneys appeared at Circuit Court trial).

The State cites Miss. Code Ann. §§ 19-23-11 and 25-31-11 concerning the supposed felony and misdemeanor demarcation of the duties of the District and County Attorneys. The statutes in effect at the time of Roberts' trials in 1977 and 1978 (1972 Code; App. A to this Brief) were greatly amended in 1978 (1983 Supp. to Code; App. B to this Brief). When Roberts was tried, the County Attorney's duties included "assist[ing] the district attorney in all criminal cases in the circuit court. . . where the services of the district attorney are

(Cont'd.)

Blackledge does not suggest that its decision would have been different had more than one prosecutor been involved. For example, this Court stated that "a person convicted of an offense is entitled to pursue his statutory right to a trial de novo without apprehension that the State will retaliate by substituting a more serious charge for the original one. . . ." 417 U.S., at 28 (emphasis added).

(Cont'd.)
required in which. . . his county. . . is interested" and "represent[ing] the state in all matters coming before the grand jury of his county." Miss. Code Ann. § 19-23-11 (1972). Obviously, when Roberts was tried, the supposed felony and misdemeanor demarcation simply did not exist.

Pursuant to the statutes passed in 1978, effective January 1, 1980, even closer cooperation is mandated. See App. B, especially §19-23-11(5) concerning reports by the County Attorney to the District Attorney.

As a further example that the Blackledge prohibition does not hinge on the number of prosecutors involved, see Bordenkircher v. Hayes, 434 U.S. 357, 54 L.Ed.2d 604, 98 S.Ct. 663 (1978), where the Court stated that

> there is no doubt that our Country's legal system vested in prosecuting attorneys carries with it the potential for both individual and institutional abuse. And broad though that discretion may be, there are undoubtedly constitutional limits upon its exercise. Id at 365. (Emphasis added).

Cf. Waller v. Florida, 397 U.S. 387, 393, 25 L.Ed.2d 435, 439, 90 S.Ct. 1184 (1970).

The absolute prohibition adopted in Blackledge mandates that the judgment below be affirmed.

V. In the Further Alternative, the Writ Should be Dismissed as Improvidently Granted.

Petitioners sought certiorari in this case alleging a conflict between the

decision of the Fifth Circuit below and this Court's decision in Vitale. In both the Petition and Brief on the merits, Petitioners wholly ignore the controlling language in Vitale upon which the Fifth Circuit relied. This omission was not pointed out to the Court in the response to the Petition for Certiorari. Petitioner does not claim a conflict with any post-Vitale case.

While Justices of this Court have dissented from denials of certiorari on Vitale issues, each of the dissents has been filed in a case involving interlocutory review of double jeopardy claims. See Illinois v. Zegart, 452 U.S. 948, 69 L.Ed.2d 961, 101 S.Ct 3094 (1981); Rivera v. Ohio, 454 U.S. 973, 74 L.Ed.2d 211, 103 S.Ct. 271 (1982). Issues presented by interlocutory review are

simply not present on the facts of this case.

Finally, as noted in Roberts' Brief at 9, Mississippi has changed the statutory scheme upon which Petitioners rely. Mississippi recently enacted a statute which prescribes the penalty for manslaughter by automobile while driving under the influence of intoxicating liquor. Miss. Code. Ann. § 63-11-30 (Supp. 1983).[9] That penalty is five

---

[9]Section 63-11-30 provides in pertinent part:

> (1) It is unlawful for any person to drive or otherwise operate a vehicle within this state who (a) is under the influence of intoxicating liquor; (b) is under the influence of any other substance which has impaired such person's ability to operate a motor vehicle; or (c) has ten one-hundredths percent (.10%) or more by weight volume of alcohol in the person's blood. . . .
>
> * * *

(Cont'd.)

years, the term apparently almost served by Roberts. Because Mississippi has changed its statutory scheme, it is unlikely that this case will repeat itself in Mississippi.

If the Court does not affirm the judgment below, it should dismiss the writ of certiorari as improvidently granted.

CONCLUSION

For these reasons, the Court should affirm the judgment of the Fifth Circuit and hold that Roberts' second trial on enhanced charges placed him in Double

---

(Cont'd.)

> (4) Every person who operates any motor vehicle in violation of the provisions of subsection (1) of this section and who in a negligent manner causes the death of another . . . shall, upon conviction, be guilty of a felony and shall be committed to the custody of the state department of corrections for a period of time not to exceed five (5) years.

Jeopardy, or, in the alternative, denied him Due Process.

In the further alternative, the Court should dismiss the writ of certiorari as improvidently granted.

Respectfully submitted,

RHESA H. BARKSDALE
Post Office Box 22567
Jackson, Mississippi 39205
(601) 948-5711
AMICUS CURIAE

OF COUNSEL:

LUTHER T. MUNFORD
Butler,Snow,O'Mara,Stevens & Cannada
Post Office Box 22567
17th Floor, Deposit Guaranty Plaza
Jackson, Mississippi 39205

APPENDIX A

STATUTES CONCERNING DUTIES OF DISTRICT AND COUNTY ATTORNEYS IN EFFECT WHEN ROBERTS WAS TRIED IN 1977 and 1978.

Section 19-23-11: Duties of County Prosecuting Attorney

> The county prosecuting attorney shall appear and represent the state in all investigations for felony before the various justices of the peace in his county. He shall also appear before justices and prosecute all cases against persons charged with carrying concealed weapons, unlawful retailing of intoxicating liquors, and the unlawful sale of cocaine, morphine and other drugs or other violations of state prohibition laws. He shall appear and represent the state in all habeas corpus trials of persons charged with capital offenses. He shall also advise and assist with reference to the prosecution of all other offenses which properly come before the justices of the peace of his county, appearing and prosecuting such cases whenever the same are contested, provided he can do so without neglecting the duties set forth in the first sentence of this section.

The county prosecuting attorney shall be the prosecuting attorney for the county court and he shall prosecute all state criminal cases therein, and he shall assist the district attorney in the prosecution of state criminal cases appealed from the county court to the circuit court.

The county prosecuting attorney shall assist the district attorney in all criminal cases in the circuit court and in all civil cases where the services of the district attorney are required in which the state, his county or any municipality of his county is interested. It shall be the duty of the county prosecuting attorney to represent the state in all matters coming before the grand jury of his county, and to approve or disapprove all accounts against the county before the same shall be allowed by the circuit court, but his approval or disapproval shall be subject to the ratification of the district attorney.

Section 25-31-11: Duties of District Attorney

It shall be the duty of the district attorney to appear in the circuit courts and prosecute for the state in his district

all criminal prosecutions and all civil cases in which the state or any county within his district may be interested; but if two or more counties are adversely interested, the district attorney shall not represent either. Any district attorney may also institute and prosecute to final judgment or decree any case in the name of the state against any person or corporation for any violation of the constitution or the laws of this state, in order to enforce any penalties, fines, or forfeitures imposed by law in any court of his district having jurisdiction, with like effect as if the suit was instituted by the attorney general.

APPENDIX B

STATUTES NOW IN EFFECT CONCERNING DUTIES OF DISTRICT AND COUNTY ATTORNEYS.

Section 19-23-11: Duties of County Prosecuting Attorney

(1) The county prosecuting attorney shall appear and represent the state in all investigations for felony before the various justice court judges in his county. He shall also appear before justice court judges and prosecute all cases against persons charged with offenses therein. The county prosecuting attorney shall be the prosecuting attorney for the county court and shall prosecute all state criminal cases therein, and he shall represent the state in criminal cases appealed from the county court to the circuit court.

(2) The county prosecuting attorney may assist the district attorney in all criminal cases and in all civil cases where the services of the district attorney are required in which the state, his county or any municipality of his county is interested.

(3) The county prosecuting attorney may present any matter to the grand jury of his county.

(4) The county prosecuting attorney shall have full responsibility for all misdemeanors, youth court proceedings, uniform reciprocal enforcement of support agreement cases, and all other cases not specifically granted to the district attorney. Provided, however, that in any municipality having a municipal youth court, the municipal prosecutor shall have responsibility for youth court matters in that court.

Where any statute of this state confers a jurisdiction, responsibility, duty, privilege or power upon a county attorney or county prosecuting attorney, either solely, jointly or alternatively with a district attorney, such county prosecuting attorney shall be responsible for the prosecution, handling, appearance, disposition or other duty conferred by such statute. Any such provision shall not be construed to bestow such responsibility, jurisdiction or power upon the district attorney where there is no elected county prosecuting attorney, and any such matter shall be handled pursuant to subsection (8) of this section.

(5) In any case handled by the county prosecuting attorney pursuant to this section which subsequently results in charges

being modified in such a manner that the case would be within the jurisdiction of the district attorney pursuant to section 25-31-11, the responsibility for prosecution shall be transferred to the district attorney. The county prosecuting attorney shall report to the district attorney the disposition of all affidavits, crimes, occurrences or arrests handled by him wherein any person is charged with a crime for which a conviction may result in imprisonment in the state penitentiary.

(6) The validity of any judgment or sentence shall not be affected by the division of jurisdiction under this section, and no judgment or sentence may be reversed or modified upon the basis that the case was not processed according to subsection (5) of this section.

(7) A county prosecuting attorney may be designated by the district attorney to appear on behalf of the district attorney pursuant to an agreement relating to appearances in certain courts or proceedings in the county of the county prosecuting attorney. Such agreement shall be filed with the circuit court clerk of any county where such agreement shall be operative. Such agreement shall be binding upon the district attorney and county

prosecuting attorney or municipal prosecuting attorney until dissolved by either of them in writing upon five (5) days' notice.

(8) In the event that there is no elected county prosecuting attorney serving in a county, the prosecution of such cases shall be handled by a county attorney employed by the board of supervisors of such county pursuant to section 19-3-49.

Section 25-31-11: Duties of District Attorney

(1) It shall be the duty of the district attorney to represent the state in all matters coming before the grand juries of the counties within his district and to appear in the circuit courts and prosecute for the state in his district all criminal prosecutions and all civil cases in which the state or any county within his district may be interested; but if two (2) or more counties are adversely interested, the district attorney shall not represent either. Any district attorney may also institute and prosecute to final judgment or decree any case in the name of the state against any person or corporation for any violation of the constitution or the laws of

this state, in order to enforce any penalties, fines or forfeitures imposed by law in any court of his district having jurisdiction, with like effect as if the suit was instituted by the attorney general.

(2) The district attorney may transfer any case handled by him to a county prosecuting attorney when charges in such case no longer constitute a felony.

(3) The validity of any judgment or sentence shall not be affected by the division of jurisdiction under this section, and no judgment or sentence may be reversed or modified upon the basis that the case was not processed according to this section.

(4) A county prosecuting attorney or municipal prosecuting attorney may be designated by the district attorney to appear on behalf of the district attorney pursuant to an agreement relating to appearances in certain courts or proceedings in the county of the county prosecuting attorney or in the municipality of the municipal prosecuting attorney. Such agreement shall be filed with the circuit court clerk of any county where such agreement shall be operative. Such agreement shall be binding upon the district attorney and county prosecuting attorney or

municipal prosecuting attorney until dissolved by either of them in writing upon five (5) days' notice.

(5) Where any statute of this state confers a jurisdiction, responsibility, duty, privilege or power upon a county attorney or county prosecuting attorney, either solely, jointly or alternatively with a district attorney, such county prosecuting attorney shall be responsible for the prosecution, handling, appearance, disposition or other duty conferred by such statute. Any such provision shall not be construed to bestow such responsibility, jurisdiction or power upon the district attorney where there is no elected county prosecuting attorney, and any such matter shall be handled pursuant to section 19-3-49, Mississippi Code of 1972.

(6) The district attorney or his designated assistant, or the county prosecuting attorney or his designated assistant, shall assist the attorney general in appeals from his district to the Mississippi Supreme Court and in other post judgment proceedings, and shall appear for oral argument before the supreme court when directed by the supreme court.

(7) The several district attorneys shall submit reports of revenues and expenditures and

shall submit budget requests as required for state general fund agencies. For purposes of budget control, the several offices of district attorney shall be considered general fund agencies and the budget and accounts of the several offices, including salaries, travel expenses, office expenses and any other expenditures or revenues, shall be consolidated for all districts as far as such consolidation is practical.

All revenue or funds allocated or expended by a district attorney, whether such funds are appropriated from state funds, or whether such funds are received from county funds, grants or otherwise, shall be reported to the commission of budget and accounting.